Supreme Court, U.S.
FILED
AUG 30 2004
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(10)

No. 03-1423

IN THE

Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL,
Petitioners,

v.

IRIS MENA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether, in light of this Court's repeated holdings that mere police questioning does not constitute a seizure, the Ninth Circuit erred in ruling that law enforcement officers who have lawfully detained an individual pursuant to a valid search warrant engage in an additional, unconstitutional "seizure" if they ask that person questions about criminal activity without probable cause to believe that the person is or has engaged in such activity.

2. Whether, in light of this Court's ruling in *Michigan* v. *Summers*, 452 U.S. 692 (1981), that a valid search warrant carries with it the implicit authority to detain occupants while the search is conducted, the Ninth Circuit erred in ruling that a two to three hour detention of the occupant of a suspected gang safe-house while officers searched for concealed weapons and other evidence of a gang-related drive-by shooting was unconstitutional because the occupant was initially detained at gun-point and handcuffed for the duration of the search.

PARTIES TO THE PROCEEDING

Petitioners state that all parties to the proceeding in the court whose judgment is sought to be review are, in addition to those listed in the caption above:

Jose E. Mena, as plaintiff below;

City of Simi Valley
Randy G. Adams
Marvin Hodges
Roy Jones
Vincent Allegra
Alan McCord
Richard Thomas
Ronald Chambers
William Lappin
Arnold Baynard
Jeffrey Dominick
Jack Greenburg
Richard Lamb
Frank Ahlvers
John Adamczyk
Tim Brown, as defendants below.

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OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioners' motion for summary judgment on qualified immunity grounds is reported at 226 F.3d 1031 (9th Cir. 2000) and is reproduced in the appendix to the petition for certiorari (Pet. App.) at 55a-72a. The judgment of the district court is unpublished and is reproduced at Pet. App. 48a-54a. The order of the trial court denying petitioners' Fed. R. Civ. P. 59(e) motion to alter or amend judgment is unpublished and is reproduced at Pet. App. 35a-47a. The opinion of the court of appeals affirming the trial court's judgment against petitioners is published at 332 F.3d 1255 (9th Cir. 2003) and is reproduced at Pet. App. 1a-22a. The order of the court of appeals denying rehearing en banc is published at 354 F.3d 1015 (9th Cir. 2004) and is reproduced at Pet. App. 23a-34a.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2003. An order denying petitioners' petition for rehearing and suggestion for rehearing en banc was entered on January 14, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

place to be searched, and the persons or things to be seized.

2. Section 1983 of Title 42 to the United States Code provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Ninth Circuit's decision in this case was a radical departure from this Court's Fourth Amendment rulings because the holdings below both restrict law enforcement officers' long-recognized ability to ask questions of citizens and undermine those same officers' power to control dangerous and fluid evidence-gathering efforts. First, the Ninth Circuit's decision that a question asked of a lawfully detained individual constituted an additional, unconstitutional seizure is at odds with this Court's consistent recognition that mere questions are not seizures under the Fourth Amendment. Second, the court of appeals' conclusion that petitioners violated the Fourth Amendment by handcuffing a group of occupants during a search of a suspected gang safe house for

weapons is incompatible with the logic of *Michigan* v. *Summers*, 452 U.S. 692 (1981), and with this Court's repeated recognition that officers as a matter of law may take reasonable measures to ensure safety during police-citizen encounters. The court of appeals compounded these two errors by concluding that its novel holdings were somehow "clearly established law" and that petitioners were therefore not entitled to qualified immunity. The Ninth Circuit reached this conclusion without pointing to a single case clearly establishing that petitioners' conduct was unconstitutional and without acknowledging the numerous decisions holding that actions similar to those taken by petitioners were reasonable. The judgment of the Ninth Circuit should be reversed.

1. On January 13, 1998, Delfino Vasquez, Ricardo Bravo, and Raymond Romero, all members of a gang known as the West Side Locos, attacked members of a rival gang in a drive-by shooting at 355 Bonita Drive in Simi Valley, California. See JA 215, 217. Bravo drove with Vasquez and Romero to 355 Bonita Drive, intending to confront members of the Varrio Simi Valley gang who lived there. See *id.* at 216. Bravo stopped the car outside the residence, and Vasquez and Romero opened fire on a group of individuals who were standing in front of the house. See *id.* at 216-17 Vasquez fired multiple shots from a .22 caliber handgun; Romero attempted to fire a chrome .25 caliber semi-automatic handgun, but his gun misfired. See *id.* at 216-18. The three men then fled the scene at high speed. See *id.* at 216. During their flight they disposed of the handguns; Vasquez threw his .22 caliber gun out the window, and Romero asked Bravo to stop the car while Romero hid his .25 caliber gun at the home of another West Side Loco. See *id.* at 217-18.

Darin Muehler and Robert Brill, the petitioners in this case, were dispatched to investigate the 355 Bonita Drive shooting. See JA 43, 215. At the time both were officers with the Simi Valley Police Department ("SVPD") and were assigned to a special gang unit. See *id.* at 43, 211-12. The victims at 355

Bonita Drive identified the shooters and gave a description of their vehicle, a light green Toyota Tercel. See *id.* at 215. Later that day SVPD officers apprehended Bravo, Vasquez and Romero at a nearby gas station in a car matching that description. See *id.* Although the men had already disposed of their weapons, the officers discovered a bullet in Bravo's pocket and found three more .25 caliber bullets on the floorboard where Romero was sitting. See *id.* at 217. Both Vasquez and Bravo confessed to their roles in the shooting, and they told the officers where to find the .22 caliber gun that had been thrown out of the car's window. See *id.* at 216. That handgun was later recovered. See *id.* at 217. Romero invoked his *Miranda* rights in response to questioning, and he was later released from custody. See *id.*

Vasquez and Bravo told SVPD officers that Romero possessed a chrome .25 caliber, semi-automatic handgun and that he had attempted to fire that handgun at the Varrio Simi Valley members on January 13. See JA 217-18. Vasquez and Bravo also told the officers that Romero had hidden the handgun at the residence of another West Side Locos member immediately after the shooting. See *id.* at 218. In addition, Officer Muehler learned from Gabriel Reyes, a member of Varrio Simi Valley, that Romero had threatened Reyes with a chrome handgun a few hours before the shooting at 355 Bonita Drive. See *id.* The officers' discovery that Romero had twice used a .25 caliber handgun to threaten or assault Varrio Simi Valley members was particularly significant, because a .25 caliber handgun had been used in the unsolved November 28, 1997, shooting of a Varrio Simi Valley member. See *id.* at 217. Officer Muehler believed that Romero likely had recovered the .25 caliber handgun that he had secreted after the drive-by shooting. See *id.* at 43, 218.

Officers Muehler and Brill learned from Romero's family that Romero was living at 1363 Patricia Avenue in a "poor house"—a single-family home that housed a number of individuals who rented space in rooms in the house, in the

furnished garage, and in motorhomes and vans parked in the backyard. JA 43-44, 145, 219-20. The officers confirmed this information by placing a phone call to 1363 Patricia Avenue; the call was answered by an individual who identified himself as "Raymond." See *id.* at 157, 220-21. Additionally, petitioners learned that Genaro Gonzalez, another member of the West Side Locos, was either living or had lived at 1363 Patricia Avenue. See *id.* at 78, 157-58, 219. Based on this information and their experience with gangs, the officers concluded that 1363 Patricia Avenue may have been a safe house for members of the West Side Locos. See *id.* at 158.

Officer Muehler secured a search warrant for 1363 Patricia Avenue on January 29, 1998, which authorized a search for, among other things, "[d]eadly weapons" and "evidence of street gang membership or affiliation with any street gang." JA 44, 210-11. The warrant authorized a search both of the house and of the vehicles on or adjacent to the property. See *id.* at 210. Petitioners were the investigating officers responsible for overseeing the search. See *id.* at 59-60, 147. In planning for the search, petitioners determined that the search would be a "high risk entry." *Id.* at 61 (testimony of Officer Brill); *id.* at 78-80 (testimony of Officer Muehler); see also *id.* at 51. In part this was because of the strong evidence that armed gang members could be present at 1363 Patricia Avenue. See *id.* at 50-51, 61, 173-74. The officers were not only wary of Raymond Romero; but also they were concerned that they might encounter Genaro Gonzalez and "other gang associates" at the residence. *Id.* at 51 (testimony of Officer Brill); see also *id.* at 61. Petitioners were also aware that 1363 Patricia Avenue had been the site of several violent incidents, including a domestic assault and a stabbing, and they knew that officers responding to the domestic assault had encountered resistance from several occupants. See *id.* at 55-59, 78-79, 91, 179-80. In light of these concerns, the officers decided to use a Special Weapons and Tactics (SWAT) team

to clear the residence and secure any occupants before the search. See *id.* at 50-51, 54, 61, 79-80, 173-74. During the week and a half prior to the search, petitioners met daily with other officers to plan the execution of the warrant in order to ensure the safety of both officers and occupants. See *id.* at 54, 145-46.

Petitioners and other SVPD officers executed the warrant at 1363 Patricia Avenue at approximately 7:00 AM on the morning of February 3, 1998. JA 62-63. The SWAT officers were armed and were wearing the outfits that they normally wore when executing search warrants, which included black vests marked with a badge and the word "police." See *id.* at 48. Respondent Iris Mena was asleep in her bed when a SWAT team officer broke down her padlocked door, pointed his weapon at her, and handcuffed her. See *id.* at 46-48, 95. The SWAT team discovered three other individuals in the trailers and motorhomes on the property and handcuffed each of them. See *id.* at 115, 136. Respondent and the other detainees were brought to a centrally located garage and remained there in handcuffs for the duration of the search. See *id.* at 90, 136, 153, 162. The garage was furnished with several beds, where respondent sat with the other occupants. See *id.* at 134. Respondent was wearing sweatpants and a long-sleeved shirt but not shoes when she was brought into the garage. See *id.* at 133-34. The officers soon brought her a jacket and shoes. See *id.* at 115, 134. She was permitted to move around the garage, and in fact she moved from one bed to another while the search progressed. See *id.* at 108, 136. Although respondent later testified that being handcuffed was uncomfortable, see *id.* at 105, she did not complain that the handcuffs were too tight and never asked that her handcuffs be loosened. See *id.* at 139.

Uncertain of the four occupants' connection to the West Side Locos and concerned that the occupants might interfere with the search, the officers did not remove the handcuffs after bringing the occupants to the garage. JA 72, 80-81.

Both petitioners testified that they restrained the occupants in handcuffs to foreclose the possibility that an occupant might resist or interfere with the search. See *id.* at 80-81, 83-84, 162. Officer Brill testified that, although respondent

> appeared to be compliant, in my experience many times when people are in handcuffs they are compliant. However, we didn't know what her full motivation was or her involvement at the scene. Although I did not have any indication to believe that she was a gang member herself, I didn't know what kind of a supportive role she may play to the gang or whether or not she was involved in any way o[r] associating with the gang members.
>
> My feeling was that if I had unhandcuffed her at that point, the possibility would have arisen that she would have at some point in[terfer]ed with our process. As an example, had she been friends with Mr. Romero and saw us recover something that could be somewhat damaging to him in the way of evidence, she may try to run or interfere or get in the way of our search. What that would necessitate is for us to now forcefully restrain her . . . [; t]hat process might injure her.

Id. at 80-81.

Officer Muehler similarly testified that the handcuffing was:

> for our safety as well as the individuals that we encounter . . . . [I]n my experience, they are much less likely to be involved and cause us to be involved in them. They are kept in a central location. They are, even though they're handcuffed, any discomforts they might have are addressed. . . . The reason we don't unhandcuff a large group of people, because then it requires us to . . . have numerous officers. We had two officers in that room [at 1363 Patricia Avenue] watching four people. If we had unhandcuffed those people, I

> would have had between six and eight officers. It's unsafe and it prevents problems.

Id. at 162.

Petitioners also testified that their decision to use handcuffs might have been different if other circumstances had minimized the potential threat that the occupants posed. JA 88-89, 195. For example, petitioner Muehler testified that he would have removed respondent's handcuffs "[h]ad she been the only occupant in that residence, had she been gravely disabled, had she been obviously pregnant, had she been elderly," or had she had other "health concerns." *Id.* at 195; see also *id.* at 88-89 (testimony of Officer Brill). The officers' testimony about the reasons they restrained the occupants of 1363 Patricia Avenue was uncontradicted at trial.

Knowing that the West Side Locos gang was "predominately made up of illegal immigrants," SVPD officers notified the Immigration and Naturalization Service (INS) before the search was initiated. JA 159-60. While respondent and the other occupants were detained, the SVPD officer guarding them asked for their names, date of birth, place of birth, and asked whether they were legal aliens. See *id.* at 106. Later an INS officer arrived at the garage and asked the occupants for their immigration documentation.[1] See *id.* at 106-07. The officers learned that one of the detainees was an illegal alien, and they took him into custody. See *id.* at 115-16. Like the others, respondent, who has a Salvadorian accent, was asked by an SVPD officer whether

[1] Respondent originally testified that an SVPD officer asked her for her name, date and place of birth, and immigration status and that the INS officer asked her for her immigration "papers." JA 106-07. On cross-examination, respondent claimed not to recall whether SVPD officers or the INS officer were questioning the occupants. *See id.* at 137. No other witness testified as to who asked the questions, in part because respondent never claimed at trial that the questioning violated the Constitution.

she was a legal alien. See *id.* at 106; see also *id.* at 98, 138. After she answered the SVPD officer, an INS officer asked for her immigration papers; she directed the officers to a purse in her room, in which they discovered her immigration documentation verifying that she was a permanent resident. See *id.* at 106-07.

The officers searched the whole interior of the house and the vans and motorhomes parked outside. JA 67. The search lasted approximately two hours,[2] and the officers discovered and seized a .22 caliber handgun with .22 caliber ammunition, a box of .25 caliber bullets, baseball bats with gang writing and other gang paraphernalia, and a quantity of marijuana. See *id.* at 82, 247-49. The officers found these items throughout the house—the .25 caliber bullets, blowgun, and one baseball bat were found in Romero's room; the .22 caliber handgun and ammunition were found in another resident's room; and one of the gang-inscribed baseball bats was found in a living room common to all residents. See *id.* at 82, 141, 247-49. After the search was complete, respondent and the other occupants were released. Pet. App. 3a, 59a; JA 156. Other than the initial handcuffing, respondent had no physical contact with the officers. See JA 137.

Respondent filed an action against petitioners under 42 U.S.C. § 1983, alleging that they violated her rights under the

[2] The officers who performed the search testified that the search lasted no longer than two hours. JA 74, 82-83 (testimony of Officer Brill that the search lasted "at most two hours"); *id.* at 156, 163 (testimony of Officer Muehler estimating that search lasted "[o]ne hour 45 minutes"). Respondent originally concurred with this assessment, estimating that she was held in the garage for "two hours" after the police videotaped the premises. *See id.* at 116. (Police videotaped the premises immediately after securing the occupants in the garage. *See id.* at 184, 187). After being recalled, respondent estimated that she was held for "two to three hours"—an assessment that still did not contradict petitioners' recollection. *Id.* at 191-92.

Fourth and Fourteenth Amendments by, *inter alia*, "arresting and detaining plaintiff IRIS Mena for an unreasonable time and in an unreasonable manner and without probable cause or reasonable suspicion." JA 19. Respondent's initial complaint, which she filed along with her father, Jose Mena, the owner of the house on 1363 Patricia Avenue, alleged multiple constitutional violations by the City of Simi Valley and eighteen police officers. See *id.* at 16-25. In addition to alleging that the officers unreasonably detained respondent, the complaint alleged that the search warrant and the execution of the search were overbroad, that the officers failed to comply with the "knock and announce" requirement, and that the officers needlessly destroyed property during the search. See *id.* Petitioners and their co-defendants argued that they had qualified immunity for any alleged wrongs, and filed a motion for summary judgment on that ground. Pet App. 59a-60a. The district court denied that motion and the Ninth Circuit affirmed that denial except for respondent's claim that the search warrant was overbroad, on which the Ninth Circuit agreed defendants were entitled to summary judgment. *Id.* at 59a-60a, 70a. At trial, a jury rejected all of plaintiffs' remaining claims save one: it found petitioners liable for violating respondent's Fourth Amendment right against unreasonable seizures. *Id.* at 50a-51a; JA 251-60. The jury ordered Officers Muehler and Brill to each pay respondent compensatory damages of $ 10,000 and punitive damages of $ 20,000. Pet. App. 53a. Petitioners filed a motion to alter or amend judgment under Fed. R. Civ P. 59(e), which the trial court denied. *Id.* at 35a-36a.

2. The Ninth Circuit affirmed the judgment, holding that the officers had violated Mena's clearly established constitutional rights in two ways. First, without even mentioning this Court's decision in *Summers*, the lower court concluded that the officers' detention of Mena violated the Fourth Amendment because it was objectively unreasonable to detain her at gun-point and to keep her in handcuffs during

the course of the search.[3] Pet. App. 8a-10a. The Ninth Circuit opined that the officers should have released Mena because she was not "the subject of th[e] investigation" and because in its judgment she "posed no immediate threat to the safety of the officers or others." *Id.* at 8a-9a (internal quotation marks omitted). The court concluded that the police were not justified in using any "heightened security measures" on Mena, but instead "should have released her from the handcuffs when it became clear that she posed no immediate threat and did not resist arrest." *Id.* at 9a. (footnote omitted).

The court further held that the officers were not entitled to qualified immunity. Pet. App. 15a. It cited two cases that it believed "clearly established" the constitutional impropriety of handcuffing an occupant of searched premises during a *Summers* detention: *Graham* v. *Connor*, 490 U.S. 386, 395 (1989), in which this Court reaffirmed that excessive force claims should be considered under a general standard of reasonableness; and *Franklin* v. *Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994), in which the Ninth Circuit held that handcuffing a severely disabled detainee who was naked from the waist down was so "degrading" and "unusual" that it violated the Fourth Amendment. The Ninth Circuit panel did not mention any of the several decisions from other federal courts recognizing that officers may restrain *Summers* detainees without violating the Constitution.

Second, the panel held that the officers had violated Mena's clearly established constitutional rights "by inquiring unnecessarily into her citizenship status" and held that "these facts alone" constituted a Fourth Amendment violation. Pet. App. 10a. The panel reached this novel conclusion

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[3] These two facts were the sole basis for the Ninth Circuit's holding that petitioners used excessive force. The Ninth Circuit did not suggest (and the evidence could not support) any allegation that the handcuffs were overly tight or that the officers used unreasonable force in any other way.

notwithstanding that Mena had never claimed at trial or on appeal that the officers' questioning alone was a seizure. See *id.* at 27a & n.3, 34a n.2. Nevertheless, the panel held that, because the officers did not have a "particularized reasonable suspicion" that Mena was not a citizen, they were forbidden to ask her any questions about her immigration status. *Id.* at 10a (emphasis omitted). Furthermore, the panel concluded that the officers were not entitled to qualified immunity because the impermissibility of asking questions was clearly established law. In support of this conclusion, the panel cited only to *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 (1975), which required officers to have reasonable suspicion before stopping individuals to investigate their immigration status. See Pet. App. 14a. The panel did not explain how a decision requiring reasonable suspicion for a stop clearly established that officers needed reasonable suspicion to question an individual who had already been lawfully detained.

3. Over the votes of seven dissenting judges, petitioners' suggestion for rehearing en banc was denied. Pet. App. 24a, 25a, 33a. The dissenting judges pointed out that the panel's conclusion that an officer's questions about citizenship created a Fourth Amendment violation was a proposition that directly conflicted with a decision of the Seventh Circuit and that "[n]o reasonable police officer would have imagined . . . was the law." *Id.* at 26a (Kleinfeld, J., dissenting), *id.* at 33a (Gould, J., dissenting). Furthermore, the dissenters argued that the panel's conclusion that the manner in which Mena was detained violated the Fourth Amendment eviscerated *Summers*' ruling that "'a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.'" Pet. App. 30a (Kleinfeld, J., dissenting) (quoting *Summers*, 452 U.S. at 705); see also *id.* at 33a (Gould, J., dissenting). The dissenters concluded that,

> [f]or their own safety and the safety of other occupants, reasonable police officers cannot be held to know that it violates the Constitution to detain for two or three hours a woman fully dressed except for bare feet during a lawful search of a house with many padlocked doors, known to house a member of a gang involved in a drive-by shooting.

Id. at 31a (Kleinfeld, J., dissenting); see also *id.* at 33a (Gould, J. dissenting) ("We should instead be more alert to the officers' legitimate concerns for safety.").

SUMMARY OF THE ARGUMENT

The Ninth Circuit erred by finding that petitioners violated respondent's Fourth Amendment rights simply by questioning her about her immigration status and by restraining her and three housemates during the execution of a lawful search warrant for gang-related items and weaponry.

I. Mere questions are not seizures, as this Court has repeatedly recognized. Seizures occur only when there is "meaningful interference . . . with an individual's freedom of movement." *United States* v. *Jacobsen*, 466 U.S. 109, 113 n.5 (1984). When an individual has already been lawfully seized, questioning, without more, does not "meaningfully interfere" with her freedom. Indeed, this Court has recognized in analogous settings that officers may question individuals who, as a practical matter, are not free to avoid the questions simply by leaving. See, e.g., *Florida* v. *Bostick*, 501 U.S. 429, 436 (1991); *INS* v. *Delgado*, 466 U.S. 210, 218 (1984). Such questioning is permissible as long as it is not so coercive or intimidating that a reasonable person would believe that her freedom was contingent on a response. Because the officers' questioning of respondent involved no such coercion or intimidation, the questions did not result in any "seizure" within the meaning of the Fourth Amendment.

Even if petitioners needed reasonable suspicion to ask respondent about her immigration status, they had such a suspicion here. They knew that two members of a gang that consists primarily of illegal immigrants resided or had resided in the house where respondent was found sleeping; that the house itself might be a safe house for that gang; and that respondent spoke with a foreign accent. These facts gave petitioners sufficient reason to suspect that respondent might be associated with the gang and that, like many of its members, she too might be in the country illegally. As California peace officers, moreover, petitioners were fully authorized to investigate possible violations of federal immigration law. At a bare minimum, petitioners are entitled to qualified immunity with respect to their questioning of petitioner, inasmuch as no law "clearly established" that they could not inquire about her immigration status in the circumstances they confronted. To the contrary, this Court's decisions established that their questioning was not a "seizure" at all, and thus that a separate showing of reasonable suspicion was not a predicate to such conduct.

II. Petitioners likewise did not violate respondent's Fourth Amendment rights by handcuffing her along with three other able-bodied occupants of 1363 Patricia Avenue during a lawful, two-hour search of those premises for weapons used in gang-related violence. This Court's decision in *Michigan* v. *Summers* allows officers to detain occupants of searched premises when a search warrant for contraband is executed. *Summers* clearly contemplates that officers have the ability to use reasonable force to restrain such detainees, for the decision would be meaningless if officers could not restrain detainees who wished to leave the premises.

Moreover, two underlying purposes of *Summers* detentions—to ensure safety and to prevent the destruction of evidence—would be completely undermined if officers facing the situation that petitioners confronted were not permitted to use restraints. Petitioners discovered multiple occupants in a

suspected gang safe house in which they were searching for (and finding) weapons. Such a search poses an acute risk of danger, and it is entirely reasonable for the officers involved to eliminate or at least reduce that danger by detaining persons at gun-point in order to assert unquestioned authority at the outset of the search, and thereafter using handcuffs to restrain detainees while the search progresses. The uncontradicted testimony at the trial below, as well as the realities of police work, confirm the propriety and reasonableness of such measures in the circumstances that petitioners faced. The use of such measures in these circumstances is certainly not sufficient to bring this case within the "unusual case" exception to *Summers*. 452 U.S. at 705 n.21. The unusual case exception only applies to particularly abusive and egregious conduct, not to precautionary detention measures used in a manifestly dangerous situation. At a minimum, petitioners are entitled to qualified immunity with respect to their detention of respondent, because no law clearly established that their initial use of drawn guns and their subsequent use of handcuffs were impermissible under *Summers*.

ARGUMENT

I. PETITIONERS DID NOT VIOLATE THE FOURTH AMENDMENT BY QUESTIONING RESPONDENT ABOUT HER IDENTITY AND IMMIGRATION STATUS.

Petitioners did not violate the Fourth Amendment by asking respondent about her identity or her citizenship. Mere questioning is not a "seizure" within the meaning of the Fourth Amendment. Nor does it become a seizure, requiring an independent showing of reasonable suspicion, simply because the person being questioned has already been lawfully detained. A contrary ruling would invalidate routine investigative techniques long understood to be permissible. In all events, even if reasonable suspicion were required in

the circumstances of this case, that standard was more than satisfied here, given the information known to petitioners when they encountered respondent at 1363 Patricia Avenue.

A. The Fourth Amendment Permits Officers To Question Lawfully Seized Detainees, Whether Or Not The Officers Have Reasonable Suspicion.

The Ninth Circuit affirmed the verdict in this case on the theory, not argued in the district court, that mere questioning of a lawfully detained person violates the Fourth Amendment.[4] That conclusion is manifestly mistaken.

Whether the questions asked of respondent violated the Fourth Amendment is a constitutional question that this Court should review *de novo*. See *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996). In the first place, this theory of liability was never presented at trial, and therefore the jury never made any findings on it. Respondent did not argue at trial or on appeal that the questioning contributed to a constitutional violation, let alone that the questioning alone violated the Fourth Amendment. Indeed, the questioning was not even mentioned in her closing argument or in the jury instructions. Even if the jury had found that petitioners' questions violated the Constitution, that legal conclusion is a question of law that should be determined *de novo*. See *id.* (holding that determinations of probable cause and reasonable suspicion should be reviewed *de novo*); cf. *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (holding that determinations of whether punitive damages awards are unconstitutionally "excessive" should be reviewed *de novo*).

[4] Although the panel suggested that the search of respondent's purse was a factor underlying its alternative basis for finding a Fourth Amendment violation, Pet. App. 14a, that additional fact has no weight in the constitutional calculus. Respondent's purse was plainly encompassed by the search warrant itself, which authorized a search for, *inter alia*, "address books . . . items of identification, utility and telephone receipts, prescription bottles, financial instruments/records, mail correspondence, keys, [and] photographs." JA 210-11. Moreover, the record indicates that respondent consented to the search by directing the officers to her purse. *See id.* at 106-07. Accordingly, the panel's alternative basis rests on mere questioning of a lawfully detained person.

This Court has made clear that a "seizure" of a person requires "meaningful interference . . . with an individual's freedom of movement." *Jacobsen*, 466 U.S. at 113 n.5; see also *California* v. *Hodari D.*, 499 U.S. 621, 624 (1991). For this reason, "mere police questioning does not constitute a seizure."[5] *Bostick*, 501 U.S. at 434; *Delgado*, 466 U.S. at 216; *Florida* v. *Royer*, 460 U.S. 491, 497 (1983) (plurality opinion); *United States* v. *Mendenhall*, 446 U.S. 544, 553-54 (1980) (plurality opinion). Law enforcement officers may ask questions of individuals they approach on the street, on a bus, or at their work, "even when . . . [they] have no basis for suspecting a particular individual." *Bostick*, 501 U.S. at 434-35; see also *Delgado*, 466 U.S. at 218.

Police questioning only becomes a seizure when it is "coercive." *Bostick*, 501 U.S. at 435-36; see also *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554 (1976) (holding that the purpose of the Fourth Amendment is "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals"). In other words, the police conduct must be "so intimidating as to

[5] Still less could a question be a "search" under the Fourth Amendment. To "'search'" is to "'look over or through for the purpose of finding something,'" "'to explore,'" or "'to examine by inspection.'" *Kyllo* v. *United States*, 533 U.S. 27, 32 n.1 (2001) (quoting N. Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989)). "Searching" requires an invasion or infringement on an expectation of privacy—something that a mere question cannot do. *Jacobsen*, 466 U.S. at 113 (holding that "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed"). No individual in society can reasonably expect not to be asked questions. *See Kyllo*, 533 U.S. at 34; *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

demonstrate that a reasonable person would have believed he was not free to leave *if he had not responded*." *Delgado*, 466 U.S. at 216 (emphasis added). In the absence of such coercion, police questioning does not involve a seizure that must be justified by reasonable suspicion.

Contrary to the assumption of the Ninth Circuit, Pet. App. 14a, the fact that a person who is being questioned is unable, for reasons independent of the questioning itself, to leave or move about freely does not alter the constitutional permissibility of police questioning. Indeed, this Court has recognized that the police may question an individual whose ability to leave is limited by their travel plans, *Bostick*, 501 U.S. at 436, or by their employment obligations. *Delgado*, 466 U.S. at 218. As long as a reasonable person would not believe that his or her ability to leave depended on answering police inquires, police are free to question individuals whose freedom is, as a practical matter, already constrained.

The same result should apply to an individual whose freedom of movement has already been "meaningful[ly] interfere[d]" with because she has been lawfully arrested, stopped, or detained. *Jacobsen*, 466 U.S. at 113 n.5. Mere questioning, without more, does not further interfere with her freedom of movement. The outcome might be different if the questioning extends the length of the detention, or if officers communicate that the seizure will not end until their questions are answered. Absent such factors, which were not present here, however, questions do not become independent "seizures" simply because they are asked of an individual who is already lawfully detained.

Delgado is particularly instructive in this regard. In that case, INS agents systematically questioned workers at three factories about their citizenship status during a surprise investigation. 466 U.S. at 213. If a worker admitted to being an alien, the agents then asked to see the worker's immigration papers. *Id.* at 212-13. The agents wore badges and were armed, and armed agents were stationed near the

building's exit. *Id.* at 212. The Ninth Circuit held that the agents could not ask workers about their citizenship without reasonable suspicion that the questioned individual was an illegal alien. *Id.* at 214. This Court reversed, holding that the officers did not need reasonable suspicion to question the workers. *Id.* at 216. The Court recognized that "interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." See *id.* Although it was true that workers did not feel free to leave their place of employment, they were not seized because their ability to leave was restricted by factors unrelated to the questioning—namely, their obligations to their employer. See *id.* at 218. The INS officers' non-coercive questioning amounted to nothing more than "consensual encounters" and was not a Fourth Amendment seizure, even though the questions were put to individuals who were not free to leave and the agents knew that fact. *Id.* at 221.

Similarly, in *Bostick*, officers questioned an individual in "the cramped confines of a bus" just before the bus was scheduled to depart. 501 U.S. at 435. As a practical matter, Bostick was not free to leave because leaving the bus would have risked being left behind and possibly losing his luggage when the bus departed. *Id.* He argued that, in light of this practical inability to leave, police questioning without reasonable suspicion violated the Fourth Amendment. *Id.* This Court explained, however, that the relevant inquiry was not whether Bostick was "'free to leave,'" but rather "whether . . . the police conduct at issue was coercive." *Id.* at 435-36. Police were not forbidden from approaching Bostick to ask him questions or ask to see his identification "so long as the[y did] . . . not convey a message that compliance with their requests is required." *Id.* at 437. Although Bostick was not free to walk away, he was free to ignore the officers or to decline their requests.

The situation of a lawfully seized *Summers* detainee like respondent does not differ in a constitutionally meaningful way from that of the workers in *Delgado* and the bus passenger in *Bostick*. The latter were in "practical custody," whereas respondent was in formal custody. In all three cases, however, persons faced official questioning that they were not free to avoid. In all three, the critical inquiry is not the fact of custody, practical or legal, but whether the questioning itself was coercive.

In this case, as in *Delgado* and *Bostick*, the questions themselves were not coercive. Questions about respondent's identity and immigration status did not extend or alter the nature of her detention in any way.[6] Cf. *Hiibel* v. *Sixth Judicial Dist. Ct. of Nev.*, 124 S. Ct. 2451, 2459 (2004) (noting that state statute requiring individuals to identify themselves during investigative stops was constitutional in part because it "does not alter the nature of the stop itself: it does not change its duration, . . . or its location"). Nor were the questions asked in a way that "convey[ed] a message that compliance with the [officers'] requests is required." *Bostick*, 501 U.S. at 435. Respondent was no less free to refuse to answer petitioners' questions than a bus passenger confronted by police who "tower[ed] over" him "in the cramped confines of a bus," *id.*, or factory workers confronted by armed agents flashing badges during a surprise inspection while other armed agents guarded every exit. *Delgado*, 466 U.S. at 212. Because petitioners' questioning was not coercive, it did not violate the Fourth Amendment.

A contrary ruling would create an illogical contradiction in Fourth Amendment jurisprudence. "There is nothing in the Constitution which prevents a policeman from addressing

[6] Since Mena testified that she was questioned either by the officer guarding the detainees or the INS agent, none of the searching officers participated in the questioning. JA 116, 192. Therefore the questions did not extend the time it took to complete the search.

questions to anyone on the streets." *Terry* v. *Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring). And, as *Bostick* and *Delgado* make clear, an officer's ability to do so does not depend on whether the person questioned is free to walk away. There is no logical reason, therefore, why the propriety of questions asked without reasonable suspicion should depend on whether the questioned person's inability to escape the questioner is the result of independent factors or a lawful exercise of detention authority. Indeed, it is incongruous to conclude that otherwise permissible questions become unconstitutional solely because they are asked during an otherwise lawful detention.

Nor would such a rule make up in clarity what it lacks in logic. To the contrary, under the approach that the court below and other circuits have adopted, the permissibility of questioning detainees turns on whether the questions are sufficiently "related" to the purposes of the detention. See *United States* v. *Murillo*, 255 F.3d 1169, 1175 (9th Cir. 2001); *United States* v. *Pruitt*, 174 F.3d 1215, 1221 (11th Cir. 1999); *United States* v. *Jones*, 44 F.3d 860, 872 (10th Cir. 1995); *United States* v. *Barahona*, 990 F.2d 412, 416 (8th Cir. 1993). The boundary between questions that are permissibly "related" to the basis for a detention and those that are unconstitutionally "unrelated" will often be unclear. Indeed, in this very case, the officers were authorized to search for "evidence of street gang membership"; they knew that members of the gang who might reside at the premises were primarily illegal immigrants; they found respondent at those premises; and they were unsure of her connection to the gang. In these circumstances, it is far from obvious that respondent's immigration status was "unrelated" to her detention. See *infra* at 23-26. In all events, the Ninth Circuit's "relationship" test is not a "readily administrable rule[]" for officers forced to apply the Fourth Amendment "on the spur (and in the heat) of the moment." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001); cf. *Dunaway* v.

New York, 442 U.S. 200, 220-21 (1979) (White, J., concurring) ("[I]f courts and law enforcement officials are to have workable rules . . . [Fourth Amendment] balancing must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers").

Moreover, to hold that officers lose their authority to question when addressing a lawfully seized individual would upset settled and important law enforcement practices. The rule that officers are free to ask questions of individuals is one of the most important rules for effective law enforcement; "[a]sking questions is an essential part of police investigations." *Hiibel*, 24 S. Ct. at 2458; see *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973) (noting that police questioning is a necessary "tool for the effective enforcement of criminal laws"); cf. *Texas* v. *Cobb*, 532 U.S. 162, 171-72 (2001) ("[T]he Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects."). Officers routinely question seized individuals in police stations, jail cells and on the street about topics that are unrelated to the seizure, and this Court has never suggested that such questioning could violate the *Fourth* Amendment. See, *e.g.*, *McNeil* v. *Wisconsin*, 501 U.S. 171, 173-74 (1991) (questioning on unrelated offense); *Mathis* v. *United States*, 391 U.S. 1, 3 (1968) (same); see also *United States* v. *Childs*, 277 F.3d 947, 950 (7th Cir.) (en banc) ("[A]n officer may interrogate a person in prison on one offense about the possibility that the inmate committed another. This is normal and, as far as we can tell, of unquestioned propriety as far as the fourth amendment is concerned."), *cert. denied*, 537 U.S. 829 (2002). Although a prisoner is certainly not free to go and although his freedom has been restrained by law enforcement, officers questioning a prisoner do not violate the Fourth Amendment because it is clear that the prisoner's release does not depend on cooperation with the questioning.

Indeed, the questions that petitioners asked respondent are particularly proper because they related to her identity. While

petitioners were free to ask any questions of respondent, this Court has recognized that questions relating to identity are particularly important to law enforcement. See *Hiibel*, 124 S. Ct. at 2458. And ascertaining the identity of illegal aliens serves an important government interest. See *Brignoni-Ponce*, 422 U.S. at 878 (recognizing "that the public interest demands effective measures to prevent the illegal entry of aliens"). In addition, questions relating to identity are particularly non-intrusive and reasonable. See *Hiibel*, 124 S. Ct. at 2458 ("In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment."); cf. *Delgado*, 466 U.S. at 216.

In short, this Court's decisions applying the Fourth Amendment, as well as the necessities of effective law enforcement, require a recognition that officers may question lawfully detained individuals provided that questioning does not extend the length of the detention or indicate that the detainee's freedom is contingent on answers to those questions. This Court should reaffirm its recognition in *Bostick* that questioning is permissible unless it is coercive, and therefore it should reverse the Ninth Circuit's holding that the questioning in this case violated respondent's Fourth Amendment rights.

B. Petitioners Had Reasonable Suspicion That Respondent Was An Illegal Immigrant.

Even if petitioners needed reasonable suspicion to ask respondent about her citizenship, they had more than enough information to form such a suspicion here. Officers may detain an individual and question her about her citizenship or immigration status if they reasonably suspect that she is an alien illegally in the country. See *Brignoni-Ponce*, 422 U.S. at 881-82. The facts known to petitioners were more than sufficient to give rise to such a suspicion about respondent.

Petitioners knew from experience that the West Side Locos were "predominately made up of illegal immigrants." JA

159-60. The officers also knew that Raymond Romero and at least one other member of the West Side Locos resided or had resided at 1363 Patricia Avenue, and the officers reasonably surmised, based on their prior experiences with and knowledge about gangs, that 1363 Patricia Avenue may have been a safe house for the West Side Locos. See *id.* at 158. The officers thus reasonably suspected that the residents of 1363 Patricia Avenue were associates of the West Side Locos and might themselves be illegal immigrants.

When petitioners encountered respondent, she was asleep in a room at this house. This suggested that she was herself a resident of this potential safe house, and thus might herself be associated with the gang. In addition, English was not respondent's first language, and she spoke with a noticeable Salvadorian accent. See *Brignoni-Ponce*, 422 U.S. at 886-87 (recognizing that apparent Latino ancestry is a factor that can support reasonable suspicion in combination with other factors); see also *United States* v. *Arvizu*, 534 U.S. 266, 274 (2002). Collectively, these facts are sufficient to justify a reasonable suspicion that respondent was an illegal alien.

Petitioners' inquiry therefore was not, as the Ninth Circuit suggested, "based on nothing more than [respondent's] name or ethnic appearance." Pet. App. 13a. On the contrary, petitioners had a particularized suspicion that respondent was an illegal alien based on a number of factors, the most significant of which was her residence in a house where at least two members of a gang of predominantly illegal aliens lived or had lived. Petitioner Muehler's uncontradicted trial testimony was that he had contacted INS *before* executing the search warrant because he knew that the members of the West Side Locos were predominantly illegal aliens. JA 159-60. It was respondent's suspected association with this gang that prompted the inquiry into her immigration status, not merely her "name or ethnic appearance."

Petitioners had the legal authority to investigate their reasonable suspicion. The Ninth Circuit's claim to the

contrary—that petitioners had "doubtful" authority to investigate immigration law violations, Pet. App. 13a n.15—is without merit. As California peace officers, petitioners were empowered to arrest for any "public offense" committed in their presence, including violations of federal criminal law. Cal. Penal Code § 836(a)(1); see *Gates* v. *Los Angeles Superior Court*, 238 Cal. Rptr. 592, 598 (Cal. Ct. App. 1987); 66 Op. Cal. Att'y Gen. 497, 500 (1983) ("[U]nless federal law specifically provides otherwise, state law enforcement officials have the authority to assist the enforcement of federal laws within their state and arrest persons for crimes against the United States."). At the time petitioners questioned respondent, both the Ninth Circuit and the Department of Justice's Office of Legal Counsel had opined that local police officers were empowered to detain or arrest aliens who had violated the criminal provisions of the Immigration and Naturalization Act. See *Gonzalez* v. *City of Peoria*, 722 F.2d 468, 476 (9th Cir. 1983), *overruled on other grounds by Hodgers-Durger* v. *de la Vina*, 199 F.3d 1037 (9th Cir. 1999); Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. Off. Legal Counsel (Feb. 5, 1996), *available at* http://www.usdoj.gov/olc/immstopo1a.htm.[7]

Petitioners therefore had the authority to investigate crimes arising under 8 U.S.C. § 1304(e), which requires all aliens, including permanent residents, to carry their immigration documentation with them at all times. *See* 20 Op. Off. Legal Counsel, *available at* http://www.usdoj.gov/olc/immstopo1a.htm (recognizing that § 1304(e) was among the immigration statutes that could be enforced by local police officers). A

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[7] Indeed, in 2002, the Office of Legal Counsel concluded that state and local officers also have a degree of authority to arrest individuals for civil immigration violations. *See* Attorney General Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), *available at* http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm.

violation of § 1304(e) is punishable as a misdemeanor. *Id.* Since the officers had the ability to arrest respondent for a violation of § 1304(e), they surely had the authority to ascertain whether she was complying with the statute by asking her for her name and immigration status. Petitioners therefore had full authority to investigate their reasonable suspicion that respondent was violating immigration laws and did not violate the Fourth Amendment by questioning respondent.

In all events, even if petitioners' questioning of respondent somehow violated the Constitution, they are entitled to qualified immunity because it was not clearly established that such conduct was unconstitutional.[8] In holding otherwise, the Ninth Circuit stated that "any reasonable officer" would have known that questioning respondent without reasonable suspicion was unlawful in light of *Brignoni-Ponce*. Pet. App. 15a. But *Brignoni-Ponce* articulated the standard for making *stops* to investigate suspected immigration violations, 422 U.S. at 884; it says nothing about the legality of questioning those already lawfully detained. If anything, this Court's decisions in *Bostick*, *Royer*, *Delgado*, and *Mendenhall* had all affirmed that officers do not need reasonable suspicion to engage in non-coercive questioning. A reasonable officer

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[8] The issue of qualified immunity is "fairly subsumed" within the first question presented, which asks whether petitioners' conduct was unconstitutional "in light of this Court's repeated holdings that mere police questioning does not constitute a seizure." Pet. (i). Qualified immunity is "intimately bound up with the . . . discussion" of the merits issue, *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 540 (1999), inasmuch as analysis of this Court's precedents will determine not only the propriety of petitioners' questioning, but also whether they should have known that it was improper (if the Court concludes that it was). *See also Procunier* v. *Navarette*, 434 U.S. 555, 559 n.6 (1978) (issue of qualified immunity fairly subsumed in question whether negligent failure to mail prisoner's letters state a claim under § 1983). In addition, the issue was decided below, *see Kolstad*, 527 U.S. at 540, and raised in the petition itself. *See* Pet. 13 n.3.

acting in light of those decisions would not have known that questions that are permissible when asked of an individual on the street or cornered in a bus become unconstitutional when asked of a person who was detained during the execution of a search warrant.

Indeed, in 1993, the Fifth Circuit concluded from *Bostick* and *Royer* that mere questioning of a detainee could never amount to a seizure, *United States* v. *Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993), and other circuits followed its lead. See *Childs*, 277 F.3d at 949-50; *United States* v. *Jacobs*, 173 F.3d 426 (4th Cir. 1999) (per curiam) (table), *available at* 1999 WL 96121, at *2. Although other circuits, including the Ninth, had held that questioning of persons detained in certain circumstances could violate the Fourth Amendment, those courts addressed the analytically distinct situation of traffic stops. See, *e.g.*, *United States* v. *Baron*, 94 F.3d 1312, 1319 (9th Cir. 1996); *United States* v. *Botero-Ospina*, 71 F.3d 783, 788 (10th Cir. 1995); *United States* v. *Ramos*, 42 F.3d 1160, 1162-63 (8th Cir. 1994). Traffic stops are investigative stops governed by *Terry*'s requirement that the stop be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. The Ninth Circuit and other courts based their holding that traffic stop questions needed to be "related" to the purpose of the stop on *Terry*'s scope requirement. See *Baron*, 94 F.3d at 1319; *Botero-Ospina*, 71 F.3d at 788. These holdings therefore do not implicate *Summers* detentions, for the scope of a *Summers* detention is limited only by the time it takes to complete the search. *Summers*, 452 U.S. at 705.

Acting in 1998, petitioners could not have predicted that the Ninth Circuit would extend its holdings in traffic stop cases to the distinct area of *Summers* detentions, and could not have known that the Fifth Circuit's application of this Court's decisions would be rejected. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."

Wilson v. *Layne*, 526 U.S. 603, 618 (1999). Because petitioners could not have imagined that their questions were unconstitutional, they are entitled to qualified immunity for questioning respondent. See Pet. App. 26a (Kleinfeld, J., dissenting) ("No reasonable police officer would have imagined that this was the law, and no police officer ought to be prevented from asking about citizenship under these circumstances.").

In sum, the judgment of the court of appeals, holding that petitioners' questioning provided a basis for a constitutional tort action, should be reversed for three independent reasons. The questioning did not constitute a "seizure" within the meaning of the Fourth Amendment. In any event, the questioning was based at least on reasonable suspicion. Finally, the law was not so clear that petitioners could be stripped of their qualified immunity.

II. RESPONDENT'S DETENTION DURING THE EXECUTION OF THE SEARCH WARRANT DID NOT VIOLATE THE FOURTH AMENDMENT.

A. Using Reasonable Restraints To Control A Group Of Detainees During The Execution Of A Search Warrant Does Not Violate The Fourth Amendment.

The Ninth Circuit also erred by concluding that the officers violated the Constitution by initially detaining respondent at gun-point and thereafter restraining her and three other occupants in handcuffs while the house was searched. The Ninth Circuit's holding failed to appreciate the gravity of the danger faced by officers executing search warrants in fluid situations, and to recognize that *Summers* itself authorizes the reasonable use of force to restrain detainees. In this case, where officers who were searching for (and finding) weapons needed to control four separate occupants, the use of restraints to "exercise unquestioned command" of the premises was reasonable. *Summers*, 452 U.S. at 703; *Graham*, 490 U.S. at

396 (holding that claims that officers used excessive force during the course of a seizure should be analyzed under the "reasonableness" standard of the Fourth Amendment).

The reasonableness of petitioners' conduct is a constitutional question that this Court should review *de novo*. See *Ornelas*, 517 U.S. at 699; cf. *Leatherman*, 532 U.S. at 436. In *Ornelas* this Court recognized that the determination of whether a given set of factual circumstances constituted reasonable suspicion or probable cause was a mixed question of law and fact that should be reviewed *de novo*. *Ornelas*, 517 U.S. at 699. *De novo* review was required for these ultimate Fourth Amendment determinations because of the need to maintain "a unitary system of law," "to maintain control of, and to clarify, the legal principles" involved, and "to provid[e] law enforcement officers with a defined set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *Id.* at 697-98 (internal quotation marks and citations omitted). These same concerns support *de novo* review for other determinations of Fourth Amendment reasonableness, such as the reasonableness of restraints used during a *Summers* detention. *De novo* review of the reasonableness of restraints used during *Summers* detentions is necessary to have a consistent body of law that gives clear guides to officers operating in dangerous and fluid situations. *De novo* review is particularly apt when, as here, the determination that petitioners' conduct was unreasonable was made by a jury. To allow the vagaries of a jury's determination of "reasonableness" to define the scope of the Fourth Amendment could create unacceptable inconsistencies. To be sure, the facts must be found in the light most favorable to respondent because of the jury verdict, but the ultimate decision of reasonableness remains one for the Court. Otherwise, to defer to a jury's interpretation of the Fourth Amendment would cede the judiciary's "province and

duty . . . to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Therefore, this Court should review the reasonableness of petitioners' restraint of the four occupants during the search *de novo*.

In *Summers*, this Court held that officers executing a search warrant for contraband have the authority "to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705. The Court concluded that such detentions were appropriate for two reasons. First, the "objective justification for the detention" created by the search warrant itself. See *id.* at 703. The warrant is an objective justification for detaining occupants because it shows that a neutral magistrate has found probable cause of criminal activity sufficient to justify a search of the premises. *Id.* Once a magistrate has verified that there is probable cause to believe that a home was being used to conceal evidence of criminal activity, "[t]he connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant." *Id.* at 703-04.

Second, powerful law enforcement interests justify the detention of occupants while a search warrant for contraband is executed. First, there is the "legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found." *Id.* at 702. "[S]ometimes of greater importance" is "the interest in minimizing the risk of harm to the officers." *Id.* To control these risks, officers must "routinely exercise unquestioned command of the situation." *Id.* at 703.

This Court in *Summers* recognized that police officers' ability to detain occupants when executing search warrants for contraband must be "routine[]" and does not depend on a particular showing of danger. *Id.* Even though the facts in *Summers* suggested "no special danger to the police," the Court recognized that "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to

sudden violence or frantic efforts to conceal or destroy evidence." *Id.* at 702. The inherent danger of executing search warrants justified a bright-line legal standard that allows officers to detain occupants and take complete command of searched premises.

The ability to detain occupants and assert unquestioned authority necessarily includes the ability to use force and threats of force. This Court has applied this logic in the related context of arrests and investigatory stops, recognizing that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396. As the Court has recognized in this context, police officers need not "take unnecessary risks in the performance of their duties." *Terry*, 392 U.S. at 23. In the inherently dangerous and fluid enterprise of executing search warrants, this means that officers need not wait for signs of resistance, flight or violence before employing force or threats of force. Officers cannot be expected to combat these serious dangers by keeping one eye on the occupants they are guarding and the other on the areas they are searching. The safety of both officers and occupants requires allowing officers to use reasonable restraints when necessary in order to assert and maintain "unquestioned command of the situation." *Summers*, 452 U.S. at 703.

The search in this case is a telling example of a situation where officers would face a substantial risk of danger unless they could use reasonable restraints to "exercise unquestioned command" of the premises. Petitioners executed a search for weapons at a house that they reasonably suspected to be a gang safehouse. Although they did not find their prime suspect, Raymond Romero, on the premises, they did find four able-bodied occupants whose residence in the same house as Romero raised the possibility that they might be associated with or sympathetic to Romero. For all the police knew when executing the search warrant, one or more of the

occupants could have been a member of the West Side Locos. Given the gang's propensity toward violent conduct, the officers unquestionably viewed the search as a high-risk undertaking. Moreover, the number of occupants created the possibility that the police could lose control of the situation had one or more of the occupants chosen to resist or interfere. In that event, of course, both the police and the other occupants would be placed squarely in jeopardy. Finally, the actual discovery of weapons in several locations throughout the house, including common areas, gave the officers further reason to be wary of the individuals as the search progressed.

Petitioners were well aware that a seemingly calm situation could quickly turn violent. As petitioner Brill testified, the mere fact that persons who are handcuffed are compliant does not mean they will remain so if they are unhandcuffed. JA 74. Given the number of detainees and petitioners' justified wariness as to what the detainees might do if released, petitioners were justified in using handcuffs to control the situation.

Although Summers provides the more specific guidance as to how best to resolve this case, the same result would follow from applying the broader ruling in *Graham*. The Court in *Graham* established that the reasonableness of any particular use of force must be judged by "a careful balancing" between the intrusion on an individual's Fourth Amendment interests and the necessity for that intrusion. 490 U.S. at 396. Here, the intrusion on respondent's interests was negligible. Because she could be lawfully detained for the duration of the search, the only additional intrusion is the fact that she was kept in handcuffs during that lawful detention. That minimal intrusion must be balanced against the well-recognized "interest in minimizing the risk of harm to the officers." *Summers*, 452 U.S. at 702. Petitioners faced a particularly dangerous situation—detaining four occupants of a suspected gang safe house while executing a search warrant for weapons. *Summers* recognized how important it was for

officers in this situation to "exercise unquestioned command of the situation." *Id.* at 703. When "judged from the perspective of a reasonable officer on the scene," petitioners' conduct was eminently reasonable and did not violate the Fourth Amendment. *Graham*, 490 U.S. at 396.

B. The "Unusual Case" Exception To *Summers* Does Not Apply To The Reasonable Use Of Restraints.

In *Summers*, this Court recognized that particularly egregious police conduct would not be insulated from liability simply because it occurred during the detention of occupants. The Court noted that, "[a]lthough special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case, . . . this routine detention of residents of a house while it was being searched for contraband pursuant to a valid warrant is not such a case." 452 U.S. at 705 n.21. The "unusual case" exception has no application to the reasonable use of restraints, particularly in a fluid and potentially very dangerous situation with multiple detainees like the one petitioners confronted.

The *Summers* Court gave no clear definition of what "special circumstances" would render a search unreasonable, except to suggest that such circumstances would only arise "in an unusual case." *Id.*; see also *id.* at 712 n.5 (Stewart, J., dissenting) (noting that the majority opinion "provides no criteria for identifying 'special circumstances' or for determining when a detention is 'prolonged'"). The Court did, however, spell out circumstances that would *not* be "special." *First*, the detention of an occupant who is not a suspect is not a special circumstance; *Summers* generally authorized detentions of occupants and did not require police to suspect occupants of any crime. *Id.* at 705. Thus, the Ninth Circuit's distinction in this case between suspects and non-suspects, Pet. App. 8a & n.5, draws no support from *Summers*. *Second*, the detention of an occupant during a search of several hours is not a special circumstance. By authorizing detentions "while a proper search is conducted,"

452 U.S. at 705, the Court recognized that detention was permissible for as long as it took officers to conduct and complete the search—"a potentially very long period of time." *Id.* at 711 (Stewart, J., dissenting). The Court was aware that "a detention 'while a proper search is being conducted' can mean a detention of several hours." *Id.*; see also *Harris* v. *United States*, 331 U.S. 145, 149 (1947) (noting that a "careful and thorough search" of a one-bedroom apartment lasted "approximately five hours"), *overruled in part on other grounds by Chimel* v. *California*, 395 U.S. 752 (1969). *Third*, the reasonable restraint of occupants is not a special circumstance. As discussed above, authorizing officers to detain occupants during a search necessarily authorizes the officers to prevent occupants from leaving and to use reasonable measures to restrain the occupants if necessary. The right to detain occupants logically implies the power "to use some degree of physical coercion or threat thereof to effect" the detention. *Graham*, 490 U.S. at 396. *Summers* would be meaningless if the only tool officers had to compel detainees to remain on the premises was their power of persuasion.

Because *Summers* clearly authorized the detention of non-suspect occupants for extended periods and the use of reasonable restraints to effectuate the detention, the "unusual case" in which detention is unreasonable must be limited to particularly abusive police conduct. Although this Court has never defined the scope of the "unusual case" exception, the circuit courts have generally limited its application to cases with especially egregious circumstances, such as the unnecessary strip-searching of detainees, see *Williams* v. *Kaufman County*, 352 F.3d 994, 1011 (5th Cir. 2003); the extended handcuffing of a disabled and partially nude man, see *Franklin*, 31 F.3d at 876-77; or excessively tight handcuffing for an extended period of time, see *Heitschmidt* v. *City of Houston*, 161 F.3d 834, 836 (5th Cir. 1998).

Far from being an "unusual case," petitioners' conduct in this case was eminently reasonable and justified under the circumstances. Petitioners executed a search warrant in a location with high potential for violence—the suspected residence of both a suspect in two gang-related shootings and another gang member. Petitioners discovered four occupants on the property; although Ray Romero was not among them, the officers' suspicion that the location was a gang safe house and the occupants' residence on the property gave the officers substantial grounds to be wary of each individual. And, when presented with a group of four such occupants, the officers were even more justified in taking the precaution of restraining the group in handcuffs. Having four detainees on the scene dramatically increased the risk that the officers would not be able to control the situation should one or more unrestrained occupants choose to resist the detention, interfere with the search, or seek to assist any occupants the officers chose to restrain. Even though the occupants may not have resisted at first, particularly in light of the surprise entry and show of reasonable, but overwhelming force, the experienced officers were well aware that the situation could change in an instant. Cf. *Terry*, 392 U.S. at 13 ("[H]ostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation."). Like the search for narcotics in *Summers*, petitioners' search for gang-related weapons was "the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." *Summers*, 452 U.S. at 702. The officers' "split-second judgment[]" that handcuffs would be necessary in a "tense, uncertain, and rapidly evolving" situation was more than reasonable, *Graham*, 490 U.S. at 397; indeed, it would have been unreasonable to fail to use some form of restraint in such a dangerous situation.

The Ninth Circuit's conclusion that the officers should have released respondent because it was "clear" that she did not

pose an immediate threat is precisely the sort of second-guessing made "in the peace of a judge's chambers" that this Court has rejected. Pet. App. 8a-9a; *Graham*, 490 U.S. at 396. The reasonableness of restraining the group of detainees during the search "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." 490 U.S. at 396. Reasonable officers on the scene were faced with four occupants, all of whom were living in a suspected gang safe house where at least two West Side Locos had resided. The potential danger of the situation was not dispelled by the occupants' failure to engage in active resistance after they were handcuffed. Reasonable officers well know that an individual who is cooperative at one moment may turn violent in an instant, a fact this Court recognized in *Summers*. 452 U.S. at 702. Moreover, despite the occupants' seeming passivity, the discovery of weapons throughout the house could only heighten the officers' concerns about all of the occupants. The officers' reasonable concern for their safety hardly could be dispelled while they were discovering a handgun, bullets, gang-inscribed baseball bats, and a blowgun during their search. In light of this well-supported justification for using handcuffs to restrain the occupants, the officers' reasonable conduct hardly constitutes an "unusual case."

In all events, even if this Court concludes that handcuffing the group of occupants that petitioners encountered was unconstitutional, petitioners are entitled to qualified immunity, because the law at the time they acted suggested that such conduct was permissible.[9] *Summers* itself

[9] The question of whether clearly established law warned petitioners that handcuffing the occupants violated the Constitution is "fairly subsumed" within the second question presented, which asks whether petitioners' conduct was unconstitutional "in light of this Court's ruling in *Michigan* v. *Summers*, 452 U.S. 692 (1981), that a valid search warrant carries with it the implicit authority to detain occupants while the search is conducted." Pet. (i). Qualified immunity is "intimately bound up with the . . . discussion" of the merits issue. *Kolstad*, 527 U.S. at 540; *see Procunier*, 434 U.S. at 559 n.6. In addition, whether there was clearly established law on this issue was decided below, *see* Pet App. 15a, was briefed by both parties below, and was raised in both the petition and respondents' opposition to the position. *See* Pet. 18-19; Opp. 14-16.

contemplates that officers will use force to effectuate detentions and assert "unquestioned command." Prior to 1998, moreover, the Ninth Circuit and a number of other courts had recognized that handcuffs could be used in investigatory stops made under dangerous circumstances.[10] Courts had also recognized that safety concerns could justify using handcuffs to restrain *Summers* detainees. The Sixth Circuit had found that handcuffing detainees and forcing them to lie on the floor was "reasonable and proportional to law enforcement's legitimate interests in preventing flight . . . and in minimizing the risk of harm to officers." *United States* v. *Fountain*, 2 F.3d 656, 663 (6th Cir. 1993). It later approved the handcuffing of a group of *Summers* detainees where "[t]he search was for drugs, which may be associated with guns, there were five persons at the property when police arrived and there was reason to believe that the persons on the property might flee if not restrained." *United States* v. *Thompson*, 91 F.3d 145 (6th Cir. 1996) (table), *available at* 1996 WL 428418, at **4. And a district court had recognized that a 90-minute handcuffing of a *Summers* detainee was

[10] *See, e.g.*, *Alexander* v. *County of L.A.*, 64 F.3d 1315, 1320 (9th Cir. 1995) (officers had qualified immunity for detaining plaintiffs in handcuffs for an hour while waiting for a witness identification); *United States* v. *Smith*, 3 F.3d 1088, 1094 (7th Cir. 1993); *United States* v. *Saffeels*, 982 F.2d 1199, 1206 (8th Cir. 1992), *vacated on other grounds*, 510 U.S. 801 (1993); *United States* v. *Esieke*, 940 F.2d 29, 36 (2d Cir. 1991); *United States* v. *Crittendon*, 883 F.2d 326, 329 (4th Cir. 1989); *United States* v. *Merkley*, 988 F.2d 1062, 1064 (10th Cir. 1993); *United States* v. *Hemphill*, 767 F.2d 922 (6th Cir. 1985) (per curiam) (table), *available at* 1999 WL 96121; *United States* v. *Taylor*, 716 F.2d 701, 709 (9th Cir. 1983); *United States* v. *Bautista*, 684 F.2d 1286, 1289-90 (9th Cir. 1982).

"more than reasonable." *Crosby* v. *Hare*, 932 F. Supp. 490, 493 (W.D.N.Y. 1996).[11]

Indeed, the Ninth Circuit itself recognized that, at the time of the search "it was not clearly established in . . . [any] circuit that simply handcuffing a person and detaining her in handcuffs during a search for evidence would violate her Fourth Amendment rights." *Meredith* v. *Erath*, 342 F.3d 1057, 1063 (9th Cir. 2003).[12] Nor did petitioners have fair warning that detaining someone in handcuffs for the several hours it takes to conduct a search was unreasonable. In fact, when petitioners acted, courts had upheld detentions during searches longer than respondent's "2 to 3 hour" estimate. See, *e.g.*, *Bernstein* v. *United States*, 990 F. Supp. 428, 432-433 (D.S.C. 1997) (four-hour detention); *Barron* v. *Sullivan*, No. 93 C 6644, 1997 WL 158321, at *5 (N.D. Ill. Mar. 31, 1997) (three-hour detention); *Cole* v. *United States*, 874 F. Supp. 1011, 1037 (D. Neb. 1995) (three and a half hour detention); see also *Garavaglia* v. *Budde*, 43 F.3d 1472 (6th Cir. 1994) (per curiam) (table), *available at* 1994 WL 706769 (qualified immunity for six-hour and three-hour detentions); *Sims ex rel. Sims* v. *Forehand*, 112 F. Supp. 2d 1260, 1269-70 (M.D. Ala. 2000) (qualified immunity because Summers left "unsettled" when a detention is "prolonged"); *Daniel* v. *Taylor*, 808 F.2d 1401, 1405 (11th Cir. 1986) (per curiam) (qualified immunity for nearly three search because "the law

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[11] A number of state courts had also ruled that *Summers* detainees may be handcuffed. *See People* v. *Ornelas*, 937 P.2d 867, 870-71 (Colo. Ct. App. 1996); *Wilson* v. *State*, 547 So. 2d 215, 216-17 (Fla. Dist. Ct. App. 1989); *People* v. *Zuccarini*, 431 N.W.2d 446 (Mich. Ct. App. 1988); *State* v. *Banks*, 720 P.2d 1380, 1383 (Utah 1986); *State* v. *Schultz*, 491 N.E.2d 735, 739-40 (Ohio Ct. App. 1985).

[12] In *Meredith*, the court recognized that no law gave fair warning that using handcuffs to restrain a detainee during a search for evidence was unconstitutional, but denied qualified immunity for plaintiffs' claim that, for part of the detention, the officer kept her in painfully tight handcuffs and refused to loosen them. 342 F.3d at 1063.

is ambiguous as to when detention in conjunction with a lawful, premises search becomes impermissible").

The Ninth Circuit cited only two cases to support its conclusion that petitioners violated "clearly established" law: *Graham* v. *Connor* and *Franklin* v. *Foxworth*. *Graham* simply reaffirmed that excessive force claims should be judged by whether the use of force was reasonable under the circumstances, not by substantive due process standards. See 490 U.S. at 393-96. *Graham* did not apply this test to the facts before the Court, and thus gave no indication that handcuffing *Summers* detainees was unconstitutional.

Franklin v. *Foxworth* involved grossly "wanton[] and callous[]" conduct, 31 F.3d at 878, far removed from the petitioners' conduct here. The officers in that case were aware that the occupant, Mr. Curry, had advanced multiple sclerosis and was unable to walk or to sit up without assistance, yet they pulled him from bed and handcuffed him, nude from the waist down, in the living room. *Id.* at 874-75. They did not provide him with any covering for at least an hour, and did not return him to his room for over two hours. See *id.* The Ninth Circuit found that the officers "wantonly and callously subjected an obviously ill and incapacitated person to entirely unnecessary and unjustifiable degradation and suffering." *Id.* at 878. Particularly crucial to the court's determination was the officers' failure to give Curry some clothing or covering for his nakedness. *Id.* at 877 ("[W]e can conceive of *no* reason why Curry was not given clothing or covering before he was carried from his bed to the living room, so that his genitals would not be exposed to the view of 23 armed strangers."). A majority of the court also found it important that he was not returned to his bed after his room was searched. See *id.*

Franklin gave no clear warning that the handcuffing of a group of able-bodied and fully clothed individuals would be unconstitutional. Indeed, because of the court's particular focus on the officers' failure to cover Curry's exposed

genitals, *Franklin* did not even establish that the decision to handcuff a severely disabled man was unreasonable. Because the *Franklin* court held that both the failure to cover Curry and the failure to return him to his room together contributed to the "wholly unreasonable manner" of the detention, *id.* at 878, a reasonable officer could not be certain that the decision not to return Curry to his bed alone was enough to violate the Constitution. More importantly, the *Franklin* court did not opine on the reasonableness of handcuffing Curry. Indeed, the court did not mention the officers' decision to keep two other able-bodied occupants in handcuffs for the duration of the search. A reasonable officer would have no way of predicting that the handcuffing of able-bodied *Summers* detainees that passed without comment in *Franklin* would later be deemed unconstitutional. Because there was no law clearly establishing that handcuffing a group of *Summers* detainees during a search for weapons was unconstitutional, petitioners are entitled to qualified immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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August 30, 2004

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